



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Petition for a Contested Case  
Hearing Regarding an Application to Abandon and  
Remove the Little Hope Dam on the Crystal River,  
Town of Dayton, Waupaca County, Wisconsin - IP-  
NE-2013-03596

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Case No. DNR-14-024

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOR DAM ABANDONMENT AND REMOVAL**

Pursuant to due notice, including notice publication, on June 3, 4 and 24, 2014, in Waupaca, Wisconsin and July 15, 2014, by telephone, a contested case proceeding was held in the above-captioned matter, Jeffrey D. Boldt, Administrative Law Judge presiding.

The parties requested an opportunity to submit written closing arguments and the last was received on August 10, 2014, commencing the statutory waiting period of 120 day days prior to entry of this decision. On January 21, 2015, the Town of Dayton moved to re-open the record in the above-captioned matter. All parties presented written responses. On February 26, 2015, the Division of Hearings and Appeals (Division) held a Telephone Motion Hearing on this Motion. On March 13, 2015 the motion was denied. All parties agreed that that hearing did not toll the statutory waiting period and that the case was now ready for a decision.

The appearances at hearing were as follows:

Department of Natural Resources, by

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Department of Natural Resources  
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Waupaca County, by

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Town of Dayton, by

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Little Hope Lake District, by

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Named Petitioners, by

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#### FINDINGS OF FACT

1. The Crystal Dam or Little Hope Dam is located on the Crystal River, in Section 1, Township 21 North, Range 11 East, Waupaca County. The dam maintains elevated levels of the Little Hope Millpond.

2. The Crystal Dam is currently owned by Waupaca County, 811 Harding Street, Waupaca, Wisconsin. The dam was originally constructed in 1855 with the historic purpose of serving as a grist mill for flour and feed grinding. (Ex. 10) In 1948, the flume and water wheel of the “Red Mill” were removed. (Id.) In 1956, a flood event caused severe damage to the dam and Waupaca County took ownership of the dam. (Ex. 1) Waupaca County reconstructed the dam in 1956. (Ex. 10) The dam serves only a recreation purpose today.

3. The Little Hope Millpond has an average depth of approximately 10 inches. At its maximum depth near the dam, the pond is approximately seven feet. The Little Hope Millpond stores approximately 80 acre feet of water. (Ex. 14)

4. The dam consists of earthen embankments leading to a stone and concrete spillway which contained three stop log bays used to control the level of the Little Hope Millpond. (Id.) The left embankment of the dam is tied to the natural high ground to the west of the dam while the right embankment of the dam is tied into and a part of the Waupaca County Highway K roadbed. (Id.) The right embankment, and roadbed for Highway K, are part of the impoundment. (Id.)

5. Roger Holman, the Director of Parks and Recreation for Waupaca testified that in 2010, during a routine inspection of the dam, Waupaca County personnel identified certain structural

issues relating to the 54 year old dam. (Id.) Contact was made to the DNR to determine what, if any, permit was needed to repair the dam. (Id.) The County was directed to hire an engineering firm to inspect the dam.

6. The engineering firm of Ayers Associates inspected the dam on January 16, 2011. (Ex. 6) Ayres Associates presented its initial report to the County on January 25, 2011, including a concern that the dam was improperly classified by the DNR as a small dam when it was, in reality, a large dam because of its height and because it stored more than 50 acre feet of water. (Ex. 5) Ayres Associates completed its work in August of 2011, and presented alternatives to the Waupaca County Parks & Recreation Committee on September 8, 2011. (Exs 2 and 10) Repair of the existing dam was not recommended because the existing spillway of the dam was deemed inadequate. (Id.)

7. In the spring of 2012, the DNR was requested to inspect the dam to determine whether the existing dam could be rehabilitated. (Ex. 10) During an August 28, 2012, inspection of the dam, DNR personnel concluded that the dam was unsafe. (Ex. 8)

8. On Tuesday, August 28, 2012, the Department of Natural Resources (Department or DNR) conducted a quick assessment of the dam. Staff observed seepage along the left abutment of the concrete dam. The embankment was deteriorated and was previously patched with concrete and asphalt. The concrete portions of the abutments were also deteriorating.

9. The Department found that the dam was not sufficiently strong and is unsafe, and dangerous to life, health and property.

10. Numerous nearby residents testified about their love of the Little Hope Millpond, and recalled touching and emotionally powerful events from their lives lived on the Little Hope Millpond. The wonderful family photos provided by the Danielson family (Ex. 319-320) document these experiences beautifully. Unfortunately, the dam has become unsafe and no municipality or other persons or associations have agreed to acquire ownership of the dam, nor have the same furnished satisfactory proof of intent to repair the dam.

11. The only seriously disputed issue of fact relates to any potential impact of the dam on the efforts to remediate an old landfill partly owned by the Town of Dayton (Town). The Town's concern is that the DNR required remediation-related monitoring wells will no longer be effective and that this will lead to increased costs, such as new computer modeling of changes or even that new monitoring wells be installed. Based upon the hearing record, the Town's concern appears to be offset by several factors.

First, the DNR Solid Waste Bureau was aware of the removal of the water from the millpond and, according, to the testimony of Scott Koehnke, was not concerned about any impact on the landfill. Secondly, the landfill is naturally attenuating and appears to offer no significant threat to the area irrespective of a possible change in groundwater flow. Finally, even the Town's engineer testified that the change in groundwater flow and gradient was only a possibility, not a probability and that future enforcement activity by the DNR could not be predicted. At this point, the Town's concerns about groundwater are speculative and the potential for DNR enforcement action is best framed in terms of a possibility, not a probability. Moreover, the potential for future DNR enforcement action regarding the landfill exists irrespective of the removal of the dam.

12. A preponderance of the credible evidence does not establish that there will be any likely impacts to the landfill remediation project from the completion of the dam abandonment and removal.

13. There was uncontroverted expert testimony that abandonment and removal of the dam would not have an adverse impact on the fishery of the Crystal River, habitat and wetland habitat. In fact, the testimony and evidence indicated that there will probably be an improvement of the fishery. In its dammed state, the Crystal River was warm, choked with sediment, and home to fish that favored that sort of environment. There was testimony (and evidence) that game fish such as bass, muskie, and northern pike were caught in years past. (Ex. 301) But this was years ago, when the impoundment was not as silted up. A recent check by the Department showed that the Little Hope pond supported a very limited fish population. (Ex. 109) Today, with the water lowered, the fish that favored warm and murky habitat are gone, but they will likely be replaced by fish that favor cooler, faster water. Mr. Neibur testified that the Crystal River's Class II trout stream status could extend into the stretch of river that was formerly the mill pond. His summary states: "Removal of the Crystal [Little Hope] Dam would increase downstream seasonal habitat for wild trout populations and decrease summer thermal impact." (Ex. 109)

14. With regard to wildlife habitat and water quality, again there was uncontroverted expert testimony that the abandonment and removal of the Little Hope Dam would not have an adverse impact. Fauna that would likely utilize the riparian corridor resulting from drainage of the millpond could include mink, river otter, Blanding's turtle, woodcock, great blue heron, and green heron, among other species. Moreover, there was testimony that the Crystal River was running clear again, an indicator of actual improvement in the water quality since the partial removal of the dam.

15. The application for dam removal and abandonment will preserve public rights in navigable waters and is likely to result in an improved fishery and water quality.

## DISCUSSION

It's not easy to lose the millpond, which has been such an important part of the lives of many area residents for decades. However, after numerous hours of testimony, the record in this hearing establishes that the County has met all legal requirements, including enhancing public safety and preserving public rights in navigable waters, and that the permit to abandon and remove the dam must be granted.

After reviewing the 2011 Ayres Associates dam safety inspection report, the Department was properly concerned about the safety of the dam structure and the County sought this permit for removal of the dam. If anything, some of those concerns were underscored by the hearing testimony. State of Wisconsin Dam Safety Engineer William Sturtevant indicated that his site visit led him to conclude that replacement of the dam would likely require building a higher costing high-hazard dam due to the location of residences in the area.

There is understandable concern about the short term impact of the dam removal upon area property values. (Lawson) As Ms. Lawson testified, this is a likely impact of the loss of the millpond, especially on the north side of the old millpond. Waupaca County considered these impacts as it debated whether to repair or remove the dam, and the County also considered published studies that indicate that there is no available evidence that property values are likely to be permanently damaged

by removal of a dam. (Sarakinis, Ex.16) These issues would have been more relevant if there had been a new application to construct a new dam or to repair and maintain the old one pursuant to §§ 31.05 and 31.06. As it was, the only issue for this hearing is whether or not to grant the permit application to abandon and remove the dam and what conditions are necessary to preserve public rights in navigable waters pursuant to § 31.185(5). The objecting residents reference to the substantive requirements of § 31.06 is misplaced. § 31.185 (3) provides as follows: “Section 31.06 governs **procedure** upon all applications hereunder.” Only the procedural requirements of § 31.06 obtain, namely that there was a notice publication. These procedural requirements were followed by the County prior to this hearing.

The DNR noted in its brief that it would have approved the dam removal as the plans were submitted in Ex. 1, if no objection necessitating the hearing had been made. There has been debate on this course of action and ample time for another realistic plan to take shape. No one has stepped forward to buy or repair the dam, and this permit must accordingly be approved.

The only change to the plans in Ex. 1 is a requirement that the County submit new dates for the commencement and completion of the work within 60 days of this Order.

#### CONCLUSIONS OF LAW

1. The Division has authority to hear contested cases and enter necessary orders in dam abandonment and removal cases pursuant to Wis. Stat. §§ 227.43 and Chapter 31.
2. The DNR has authority pursuant to Wis. Stat. §§ 31.02 and 31.19 to inspect or cause an inspection to be made of any dam or reservoir.
3. The DNR has authority pursuant to Wis. Stat. §§ 31.02 and 31.19 to order alternations and repairs to any dam that is not sufficiently strong or is unsafe, and that is dangerous to life, health and property.
4. The DNR has authority pursuant to Wis. Stat. §§ 31.02 and 31.19 to order the drawdown of the impoundment above a dam that is not sufficient strong or is unsafe, and that is dangerous to life, health and property.
5. The DNR properly ordered the removal of the Little Hope Dam on September 14, 2012, because the dam was unsafe and dangerous to life, health and property.
6. Pursuant to that DNR order, the County submitted an application to abandon and remove the Little Hope Dam on October 16, 2013.
7. The dam application meets all applicable procedural standards under Wis. Stat. § 31.06, including notice publication, and the Division has deferred action on the application for the 120 day waiting period set forth in Wis. Stat. § 31.185(4).
8. No “municipality or other person or associations” have agreed to acquire ownership of the dam nor furnished satisfactory proof of intent to comply with Wis. Stat. §§ 31.14(2) or (3).

9. The only issue for this hearing is whether or not to grant the permit application to abandon and remove the dam and what conditions are necessary to preserve public rights in navigable waters pursuant to § 31.185(5). The dam abandonment and removal application submitted by the County will preserve public rights in navigable waters.

10. The application must be approved to protect public safety.

11. A dam abandonment is a Type 2 action pursuant to Wis. Admin. Code NR 150.03(f)(7)(a). The DNR prepared an Environmental Assessment (Ex. 8) and has complied with the procedural requirements of WEPA in this matter.

### ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the application for dam abandonment and removal be GRANTED pursuant to the plans and specifications and dam removal plan submitted previously as Ex.1

IT IS FURTHER ORDERED, that the County shall submit an updated dam removal plan, complete with new dates for commencement and completion of the work within 60 days of this Order.

Dated at Madison, Wisconsin on March 26, 2015.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By: \_\_\_\_\_  
Jeffrey D. Boldt  
Administrative Law Judge

### NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.